A path from co-government to democracy

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Introduction

New Zealand is at a constitutional crossroad. In one direction is liberal democracy. In the other is co-government: power-sharing between one ethnic group and all others.

There is little open debate about how New Zealand should choose between liberal democracy and co-government because questioning co-government is often met with charges of racism. But co-government is divisive and wrong and New Zealand needs a path away from it.

The relationship between Māori and non-Māori faces real challenges. ACT acknowledges this and believes they are best faced within a liberal democratic framework, rather than through co-government.

New Zealanders want to ensure Māori language and culture are preserved, that every child has equal opportunity, and that the wrongs of the past are put right.

Due to a combination of confusion and deception, New Zealanders are being told that radical constitutional change is necessary to solve these problems. This is not only untrue, it is also dangerous. We are told we must become a 'Tiriti-centric' New Zealand where there are two types of people in partnership - tangata whenua (land people) and tangata tiriti (Treaty people) - who would each have different political and legal rights.

Any constitutional system that gives different people different rights is incompatible with universal human rights which are essential for peace and prosperity. Whenever people are given different legal rights, they inevitably fight to regain their rights and dignity.

ACT's vision for New Zealand, in keeping with our liberal democratic traditions, commitment to universal human rights, and growing ethnic diversity, is that of a modern, multi-ethnic, liberal democracy.

ACT will restore universal human rights in New Zealand by:

1. Legislating that the principles of the Treaty are based on what the Treaty actually says, in contrast with recent revisionist interpretations of the Treaty's principles, through a Treaty Principles Act and inviting citizens to ratify it.
2. Repealing recent laws that give different rights based on ethnicity, such as the Three Waters legislation, local government legislation, and elements of health legislation.
3. Reorienting the public service towards a focus on equal opportunity and need according to robust statistical evidence instead of racial targeting, along with devolution and choice for all.

Race relations challenges our country faces

The relationship between Māori and non-Māori faces three significant challenges: the loss of Māori language and culture since 1840, the taking of land and resources without proper compensation, and poor outcomes for Māori in nearly every social statistic. They are all different and deserve different solutions. However, we are currently being offered the same solution to each: constitutional transformation.

Māori language and culture was nearly the only language and culture in New Zealand in 1840. By the turn of the 20th century, there were only 42,000 Māori in New Zealand, and some thought that not only the culture but the people themselves might die out. Today around 185,000 people can speak te reo, around three quarters of a million people identify as Māori, and the number of te reo speakers is rising. Nonetheless, some argue this number is too small to prevent the language from becoming extinct. Many people would like to see the language and culture preserved. The question is how to ensure this happens, and whether co-government would help.

There have been enormous breaches of the Crown's promise to protect property rights. From owning around 80 per cent of New Zealand's land mass in 1860, less than five per cent of New Zealand's land mass is in Māori title today. Most of the land was legitimately sold, but a lot was also confiscated or the Crown failed to keep its side of the deal. The Crown also failed to protect Māori landowners (who often owned the land as trustees on behalf of their hapū) from the demands to sell from British settlers. Seeking to address these failings through the Treaty settlement process is one of New Zealand's greatest achievements. Few other countries would be prepared to forensically examine injustices stretching back 180 years and fix them. Yet New Zealand has and the process has near-unanimous support.

The remaining and most current and material challenge is that of inequitable outcomes in nearly every social and economic statistic for Māori. Life expectancy is often quoted, with Māori living seven years shorter than average. Education is another example. Last year, 36.6% of Māori, 57.3% of European/Pākehā and 79.9% of Asian school leavers attained NCEA Level 3 or above. Homeownership rates are 28% for Māori compared with 57% for European New Zealanders. Incarceration rates are no better, with Māori being 52% of people in prison, despite comprising approximately 15% of the population.

These statistics have many causes that defy easy explanations, but most fair-minded New Zealanders

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believe in equal opportunity and would like to see them fixed. ACT believes co-government is not the answer to solving these problems. Instead the solutions lie in more robust, evidence-based targeting, greater devolution of public services, and maintaining New Zealand's liberal democratic system. Our society is simply too diverse and intertwined to be separated into a binary system of two peoples.

Can we honour the Treaty without "partnership?"

ACT supports the completion of full and final historic Treaty settlements as a pragmatic way to resolve past injustices. Some of the settlements include co-management arrangements brought in before 2017, where recognised customary rights of iwi are balanced with existing public rights (such as recreational use of Crown land, fishing, etc). These co-management arrangements include the Tūpuna Maunga Authority managing Auckland's volcanic mountains, Rotorua Te Arawa Lakes, Te Urewera, and the Te Awa Tupua (Whanganui River settlement). We believe these co-governance arrangements are pragmatic ways to reconcile Māori customary and public interests over traditionally shared resources such as rivers and mountains.

What ACT opposes is co-government being extended from specific instances of redress into a general privilege for iwi; from recognising rangatiratanga over specific property rights to an overarching granting of privilege in all things, including political rights and the delivery of public services (or co-government). That is contrary to both liberal democracy and to the Treaty's guarantee to provide equal rights for all.

Advocates for co-government have argued that the creation of co-government is required by a Treaty "partnership". The term "partnership" does not appear in the Treaty of Waitangi. The concept of "partnership" was given force when Parliament, with very little debate, included undefined "principles of the Treaty of Waitangi" in the State-Owned Enterprises Act 1986. The Court of Appeal was left to be "creative" and interpret this in 1987, writing that the Treaty "signified a partnership between Pākehā and Māori requiring each other to act towards the other reasonably and with the utmost good faith". However, this definition of "partnership" was relatively restrained. The court found that the principles of the Treaty "do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed, to shackle the government unreasonably would be itself inconsistent with those principles". The court found the obligation on Treaty partners to act in good faith did not extend to an automatic obligation to consult, and the court's presiding judge, Justice Cooke, would later emphasise that "partnership certainly does not mean that every asset or resource in which Māori have some justifiable claim to share should be divided equally".

Despite political unease with the creativity of the courts in determining Treaty principles, successive governments failed to define in law what the Treaty principles really are. Treaty principles were added into more legislation, but as the Minister who introduced the Resource Management Act 1991 stated later, "I am quite sure that none of us knew what we meant when we signed up to that formula". Nevertheless, the courts and the Waitangi Tribunal have steadily pushed the boundaries of what is meant by Treaty principles and partnership. As the Supreme Court's Ngāi Tai Ki Tāmaki Tribal Trust v Minister of Conservation decision makes clear, the judiciary will interpret the scope of the amorphous "principles of the Treaty" very widely, though not the actual articles of the Treaty itself. In this 2019 decision, a Treaty principle of "active protection" extends to the Government having a duty to privilege iwi in economic development, in which interests with "mana whenua" were deemed stronger than other commercial interests.

The interpretation of "partnership" as meaning co-government or parallel government in everything is sweeping in its logic. This makes the view of the Treaty as a partnership awarding Māori special rights a question of constitutional importance for all New Zealanders to decide.

ACT questions whether the Treaty is a "partnership" that goes beyond the original definition of all parties acting "reasonably and with utmost good faith." ACT believes that the original text of the Treaty signed in 1840 is a guide forward.

As Dame Anne Salmond wrote: "it is the 1987 neo-liberal rewriting of the Treaty of Waitangi as a 'partnership between races' that lies at the heart of current difficulties in reconciling Te Tiriti with democratic principles, not the original text." She goes on to state: "Sir Robin Cooke's rewriting of Te Tiriti as a binary 'partnership between races' has been interpreted as requiring a split in kāwanatanga, or governance at the national level. The division of populations into 'races,' however, is a colonial artefact that cuts across whakapapa and is scientifically obsolete. It is not a sound basis for constitutional arrangements in the 21st century. In these complex, challenging times, leaders need an acute sense of justice and fair play, and how this is understood by different groups in our small, intimate society. The exchange of promises in Te Tiriti requires fair and equal ways of living in which indigenous tikanga are respected, and ordinary persons, as well as rangatira and hapū, have tino rangatiratanga. At present, as the inequities within and among different groups increase,

we are heading in the opposite direction."

There is nothing in any of the three Treaty articles that suggests that Māori should have any special rights above other New Zealanders. The Treaty itself guarantees that "all the ordinary people of New Zealand...have the same rights and duties of citizenship." The Treaty does not confer greater privileges on Māori than the Government owes to other New Zealanders. All New Zealanders have a basic human right to be treated equally under the law and with equal political worth. One person, one vote.

1) A Treaty Principles Act and giving New Zealanders a say

Far from a divisive document that affords unique privileges to one group, the Treaty is a taonga for all New Zealanders, establishing that all New Zealanders have above all else the same rights and privileges as each other and that the government has a duty to protect those rights. Treaty principles are not vague "free floating" ideas for activist judges and officials to divine. Parliament created the "principles of the Treaty", so Parliament has the right and the duty to define what they are.

Allowing the courts, the Waitangi Tribunal and the bureaucracy to effectively write the constitution is contrary to the notion that major constitutional change can only be with the explicit consent of the people. This is especially important given that the courts and the bureaucracy are increasingly making reference to vague Treaty principles as justification for actions which are contrary to other matters (such as equal voting rights). To avoid the courts and the public service from venturing into areas of political or constitutional importance based on amorphous principles, Parliament has a duty to set out what those principles are.

The Māori version of the Treaty provides a guide for its principles:

Article 1: "kawanatanga katoa o o ratou whenua" – the New Zealand Government has the right to govern all New Zealanders

In the first article of the Treaty, rangatira gave absolutely forever the complete government (kāwanatanga) of New Zealand. However, Māori chiefs were right in 1840 to place two crucial limits on the power of government (and the potential tyranny of the majority): that their property couldn't be arbitrarily taken by the government, and that they would not be denied the same rights and privileges as British subjects.

Article 2: "ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa" – the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property

The second article of the Treaty guarantees the chiefs, hapū and all the people of New Zealand the authority over their land, houses and treasures for as long as they wish to own those. There is no mention of rights belonging to a particular ethnicity or race in Article 2 of the Treaty. In the Treaty, Queen Victoria promises 'te tino rangatiratanga' of their lands not just to the rangatira and hapū, but to 'all the inhabitants of New Zealand.' However, New Zealand's history has shown poor regard for upholding Māori property rights. The protections of property rights against the desires of the government are weak. Repeatedly, governments seize or impose controls on peoples' property well beyond any legitimate public interest and ignore the rights of ownership. ACT believes the principle of rangatiratanga over one's own property is a basic human right. The right to use and enjoy one's own property is a basic human right for natural persons embodied in a number of overseas constitutions and the UN Declaration of Human Rights. ACT believes in the words of the Treaty: that rangatiratanga over one's property and possessions are protected.

Article 3: "a ratou nga tikanga katoa rite tahi" – all New Zealanders are equal under the law with the same rights and duties

The third article of the Treaty is unequivocal. It guarantees equal rights for all (ngā tikanga katoa rite tahi). This is consistent with New Zealand's egalitarian culture and political history, where many peoples came to New Zealand to escape the inequalities of class, caste or tribal societies. The guarantee for equal rights is embodied in the Bill of Rights Act and the first article of the UN Declaration of Human Rights which states that "All human beings are born free and equal in dignity and rights." ACT says that nobody is entitled to superior rights or privileges because of their ancestry or identity. To argue otherwise is inconsistent with the Treaty's guarantee of equal rights and duties for all.

Putting the Treaty Principles Act to referendum

The End of Life Choice Act was passed by Parliament in 2019 and confirmed by the people in referendum at the 2020 election. This sequence allowed Parliament to debate and fine tune a proposed law, and the people to have the final say about whether it should become law. Critically, this was a 'binding' referendum. The majority voted 'yes' and it automatically became law. We propose the same process for the Treaty Principles Act. This law should be passed by Parliament with the

usual process of debate, public submissions, more debate, then subject to a yes or no vote by the public. Public ratification would have two effects. It would put the Act above other statutes because it would be one of few, along with the laws that brought in the MMP voting system and the End of Life Choice Act, that have been ratified by the people. Second, it would legitimise an open debate about the Treaty and its place in our constitutional future. The result would be a much more robust and widely understood conception of New Zealand's constitutional arrangements, and each person's rights within it.

The New Zealand Parliament is highest representative of the people. Questions of constitutional importance must be debated there. All New Zealanders, including Maori, will be able to have their say in the open select committee process, where alternate interpretations of what the Treaty actually says can be heard and debated openly. ACT believes that in a democracy based on equal rights of all the ultimate decider of important issues has to be the people.

2) Reversing Labour's divisive laws

Based on its interpretation of the Treaty, Labour is pushing through profound constitutional change with the intention to shift from liberal democracy based on the principle of every citizen being equal under the law to a state of two ethnically based separate "spheres" as described in He Puapua. The Labour-NZ First Government commissioned 'He Puapua'. While Labour denies it is official policy, many of its recommendations are nonetheless being implemented. Jacinda Ardern said that the principle of one person, one vote was "overly simplistic". Willie Jackson states that "democracy has changed," but no one voted for this change. None of this was in Labour's 2017 or 2020 manifestos, and the New Zealand public has never debated or voted on Labour's co-government agenda. The Government has sought to cancel open debate on the issue, dismissing any criticism as 'racist' or 'race-baiting'. This is Labour fundamentally overturning the concept of "one person, one vote" without mention in their election manifesto, without debate, and without referendum. It undermines democratic values. Labour's co-government agenda is being driven through a range of laws.

The Pae Ora (Healthy Futures) Act is an exercise in co-government. The historic control of health through local democratically elected boards has been swept away. The health system will be controlled by two new entities: Health New Zealand, and a parallel Māori Health Authority. This delivers a centralised but ethnically divided health system. The new health system principles say that the system should "provide opportunities for Māori to exercise decision-making authority", but there is no requirement for anyone else. The Māori Health Authority will have a joint say in the provision of health services for all other New Zealanders. In effect, healthcare is being prioritised according to racial identity and not the actual needs of individual patients.

Another example is the Three Waters legislation. Labour is determined to force an untested and risky ethnicity-based co-government model onto the new water service entities. Control of water services will sit with 50:50 representatives of democratically-elected councils and appointed Māori. The new water corporations must give effect to "te Mana o te Wai" principles which prioritise the health and well-being of water above the health needs of people or the economic needs of communities.

Co-government is being put into the heart of all future resource planning and administration through the proposed Natural and Built Environments Act. A vague concept, "Te Oranga o te Taiao", is the foundational principle of the Bill. Local democratically elected government is being replaced by centralised ethnicity-based decision-making. Local planning requirements are to be set by elected representatives (one per local authority) and mana whenua representatives. It is notable that trying to determine those Māori representatives may prove to be fraught, since urban Māori authorities dispute whether iwi as "feudal tribal constructs" represent Māori, and that: "It is a breach of te Tiriti for mana whenua Māori to be treated as first-class Māori, while tangata whenua Māori are treated as second-class Māori. There should be no first and second class when it comes to Māori, for we are all equal."

The Canterbury Regional Council (Ngāi Tahu Representation) Act has two voting members appointed by Ngāi Tahu to the otherwise democratically elected Canterbury Regional Council, in effect giving Ngāi Tahu people in Canterbury two votes and a completely disproportionate vote weighting on the council. This is, according to Labour MPs, "the evolution of our Treaty partnership". Labour MPs state that this Act is a "potential pathway" for all other regions.

The Oranga Tamariki Act has been amended by the addition of section 7AA. That section requires that Oranga Tamariki put the Treaty at the centre of its operations. In practice it means that Māori children are reverse uplifted from Pākehā foster homes even when they are perfectly happy and thriving, because cultural considerations trump considerations.

ACT will immediately repeal the Māori Health Authority,

the Natural and Built Environments Act, and Three Waters legislation. Other Acts will be amended as necessary to ensure that the principle of "one person, one vote" is the basis of democratic representation in local government, and that the essential purpose of legislation is focused on the delivery of effective government for all New Zealanders.

3) Reorienting the public service towards liberalism...

Besides legislation, race based ideology is being woven into the practices and administration of the public service. Government departments are busily pursuing co-government through policies, governance bodies, and strategies. Across all governments there has been a proliferation of policies where the first and primary focus is on "Te Tiriti", and requirements for knowledge of te ao Māori, skills in te ao Māori and mātauranga Māori, rather than a focus on the agency delivering for all citizens on an equitable basis.

The Department of Conservation claims that conservation is a "Eurocentric" concept, and recommends that tangata whenua should be able to develop conservation estate in a way consistent with "mātauranga Māori". It calls for fundamental reform of the conservation system "to reflect Te Tiriti partnership at all levels", including potentially commercial privileges and development rights.

Funding for science "expects all research priorities to be co-developed with Māori, and to give active effect to Te Tiriti, with a clear process in place to enable this." In effect, science is being subjected to the determinations of what is Māori traditional knowledge.

The Public Interest Journalism Fund guidelines state that media taking government money must "Actively promote the principles of Partnership, Participation and Active Protection under Te Tiriti o Waitangi acknowledging Māori as a Te Tiriti partner". The NZ On Air "Te Tiriti Framework for News Media" states that the media must accept that: "it is not simply a matter of reporting 'fairly', but of constructively contributing to te Tiriti relations and social justice...Media organisations need to consider the colonial context of living in Aotearoa New Zealand, and identify structural causes – institutional racism, colonisation, inequities and Pākehā advantage."

A common theme for many of the policies being driven through government is a concern for Māori equity, in which, for example, Māori health outcomes on average are worse than for other New Zealanders. The rationale is that Māori health outcomes are because of "systemic racism" (though little evidence supports that). However, equity reasoning would have resulted in including Pasifika, disabled people, elderly, rural people, and others having their own co-government solutions as well. If worse socioeconomic outcomes for one ethnic group justify co-government, then it should apply to all disadvantaged ethnic groups. Separate governance for Māori, and not others, is justified on the basis of obscure Treaty obligations.

ACT's approach to the public service would remove these biases and reorient the public service towards serving all citizens equally based on their measured need rather than Treaty status.

...by focusing the public service on equal opportunity, not ethnicity...

In order to focus on citizens' needs, the government requires more sophisticated ways of measuring need. ACT in government would orientate the public service towards sophisticated use of data to identify need rather than crude race-based targeting. Trying to differentiate public services on the basis of ethnicity is fraught. The definition of who is Māori matters. Is the target of public services anyone who can whakapapa to a Māori ancestor (and how?), or is it membership of a corporatised tribe? What of households where one person is of European ethnicity and the other is of Māori ethnicity; why should two people in identical circumstances be treated differently by the government? And if services are prioritised for people claiming one ethnicity, what is to stop other people simply claiming that ethnicity to get preferential access? More problematically, does ethnicity alone serve as an indicator of need?

If government services are to be delivered on the basis of ethnicity, then there must be strong evidence that ethnicity is the primary cause of the problem. Otherwise, the policy will result in injustice, in which a well-off member of the privileged population is receiving treatment ahead of someone outside the group who may be a lot worse off. An example is the Ministry of Health analysis, which justifies separate healthcare treatment on the basis of ethnicity because "systemic racism" denies Māori equal access to quality of care. But the Ministry of Health's own analysis is that there are other significant factors in determining health outcomes. Ensuring that accurate data and evidence drives policy is critical, especially if decisions are to be made that deliberately privilege one group over others. The good news is that parts of government are starting to develop tools which enables the targeting of policies in a much more accurate way, on the basis of actual individual need rather than overarching blanket categories of ethnicity. While average Māori outcomes may be

worse, this is not always the case at the individual level. Many Māori have better health, education, personal wealth and other outcomes than non-Māori, and many non-Māori have worse outcomes than average Māori people. Ethnic identity and racism are factors in creating socioeconomic disadvantage, but it is one factor amongst many others, including education, isolation, and strength of family structures.

More than ever before, the government has access to data that can assess the risks and disadvantages faced by individual people, and deliver services in a more targeted way. For example, the Ministry of Education has developed an Equity Index to understand the relationship between socioeconomic circumstances and student achievement and address equity issues. The model assesses which socioeconomic characteristics across variables best predict a student's academic achievement to produce an EQI number for each school. This can allow for much more targeted policies based on the actual needs of the individuals, and not a single blanket category of ethnicity. The EQI also shows that co- government on the basis of ethnicity to achieve socioeconomic outcomes is unlikely to work. Undoubtedly, ethnicity is a factor explaining worse outcomes, but it is not the only one. Government policy has to deal with a multitude of factors, and creating an entire bureaucracy revolving around one - ethnicity - won't work.

ACT in government would make the Equity Index an example of how social policy can be done. It measures actual need based on real world data instead of assumptions applied to all members of a given race.

...and devolving, not dividing, service delivery

Labour has consistently sought to solve complex problems by creating large centralised bureaucracies, with a parallel Māori structure (or embedded 'te Tiriti' branches). It is not explained how the creation of a divided centralised bureaucracy will resolve problems. The rationale for co-government appears to be that creating additional tiers of Māori bureaucracy will somehow trickle down to ordinary Māori experiencing poor health outcomes. There is no evidence that creating a parallel, centralised bureaucracy will achieve better outcomes, whether it is Māori or not. Indeed, there is frustration from many, such as primary healthcare providers, at the inflexibility and sluggishness of the Wellington bureaucracy, suggesting that greater centralisation, but with ethnic separation, is not going to result in better outcomes on the ground.

ACT believes that decentralised systems close to their communities allow for greater innovation and responsiveness. ACT advocates moving from an ethnicity-based, centralised system to a more equitable and socially responsible one where the actual needs of individual people underpin decision-making. One example of successful devolution was the creation of Partnership Schools, Kura Hourua (aka charter schools). Most of the schools were run by Māori or Pasifika trusts. The intent was that if they have clear, outcomes-focused accountability, freedom to manage and govern, and a broadly similar level of funding to that for state schools, they will then be able to develop innovative solutions that match local needs while still meeting high-quality standards. This, in turn, enabled them to attract students who have previously not been well served by the education system and led to equitable achievement outcomes for those students. Within two years of their establishment, an independent review found that most partnership schools/kura had positive outcomes for students across a range of areas, including exceeding targets for student achievement, student attendance and student engagement, as well as positive outcomes in subjects other than reading, writing and mathematics for primary age students, improved self-esteem and self-worth, development of high aspirations, adopting school/kura values and greater security of identity, culture and language. Sadly, one of Labour's first acts was to abolish the schools.

There are also successful devolved services for Māori being delivered by individual iwi and hapū for their members. Ngāti Whātua runs a medical centre and have private health insurance for its members. The Tainui iwi's Raukura Hauora O Tainui currently operates four medical clinics in Waikato.

ACT will refocus government agencies on effective delivery of services for all New Zealanders and vague criteria for "Te Tiriti" will be ended. A Government including ACT will make it clear that the delivery of public services should be according to individual needs, and not aimed at privileging any particular group. This will be done by using data to assess the needs of individual citizens to guide policy and the devolution of service delivery as close to the affected people as possible.